MM HOLDINGS, INC.

IBLA 91-327 Decided October 7, 1991

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, declaring the Liberty No. 56 mining claim void ab initio because it was located on land patented without a mineral reservation. NMMC 153930.

Affirmed.

1. Rules of Practice: Protests--Surveys of Public Lands: Generally

A supplemental plat of survey, approved in 1968, may not be challenged years later by a protest filed under 43 CFR 4.450-2 because that section of the regulations identities a protest as any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. The previous approval and filing of a plat of survey is not an action proposed to be taken.

2. Mining Claims: Lands Subject to--Mining Claims: Location

Where the official records of the Bureau of Land Management show that land upon which a mining claim has been located were patented by the United States without a mineral reservation, the mining claim is properly declared void ab initio.

APPEARANCES: David A. Marion, Esq., San Jose, California, for appellant; Margaret C. Miller, Esq., for the Bureau of Land Management; Fred E. Ferguson, Jr., Esq., Phoenix, Arizona, for intervenor, Phelps Dodge Mining Company.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

In a letter to MM Holdings, Inc. (MM Holdings), dated January 23, 1991, the New Mexico State Office, Bureau of Land Management (BLM), informed MM Holdings that it was adjudicating certain mining claims, including the Liberty No. 56 mining claim, and that it had determined that all the claims had been located on lands patented without a

reservation of minerals to the United States. 1/ BLM requested that MM Holdings relinquish the claims or inform it how its determination was in error.

By letter to BLM dated February 14, 1991, MM Holdings refused to relinquish the claims and asserted that the Liberty No. 56 covered "a sliver of unpatented and unclaimed property between the Copper Mountain Lode and Ridge Spring [Lode] patented claims." It indicated that the claim included land that was designated as "Lot No. 19 on the January 1930 supplemental plat of Sections 21 and 28 [T. 19 S., R. 15 W., New Mexico Principal Meridian]."

In response to that submission, BLM issued a decision dated May 1, 1991, declaring the Liberty No. 56 claim void ab initio because it had been located entirely on land patented without a reservation of minerals to the United States. BLM explained that its Branch of Cadastral Survey had informed it that "in 1968, Cadastral Survey approved a supplemental plat determining the nonexistence of the wedge lot, which supersedes all other plats." BLM stated that such determination was the basis for its decision.

BLM concluded its decision with two paragraphs. The penultimate paragraph stated:

> If you wish to protest the BLM's determination, based on the approved supplemental plat, the filing of a formal protest with the State Director, New Mexico State Office, will be necessary. Please include all relevant and pertinent information to substantiate your protest.

BLM provided MM Holdings with no timeframe in which the "formal protest" had to be filed. However, the next paragraph was the standard appeals paragraph providing the right of appeal to this Board within 30 days of receipt of the decision.

MM Holdings filed a timely appeal to this Board maintaining that the Liberty No. 56 was properly located on land open to location. In support of its position, it submitted a plat of a survey of the area conducted by a New Mexico registered professional surveyor in November 1989 showing a wedge of land between the Copper Mountain (Mineral Survey 211) and the Ridge Spring Lode (Mineral Survey 1292) mining claims, both owned by Phelps Dodge Mining Company (Phelps Dodge). MM Holdings asserts that the wedge of land was recognized in a January 1930 supplemental plat and, in fact, was assigned a lot number (Lot No. 19) at that time.

On July 31, 1991, BLM filed a document styled "Motion to Dismiss and Alternative Motions to Remand or for an Extension of Time" to file a

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1/ The Liberty No. 56 claim was located on May 3, 1990, and filed for recordation with BLM on May 7, 1990.

response to this appeal. In the first motion, BLM argues that "to successfully challenge the BLM's May 1, 1991, decision * * * the appellant must challenge the accuracy of the 1968 supplemental plat," which, it contends, requires that appellant file a protest of that plat with the State Director. Since MM Holdings has not filed a protest, BLM concludes that the 1968 plat must be presumed accurate and the appeal dismissed. Alternatively, BLM contends that if the Board considers the appeal actually to be a protest of the 1968 plat, the appeal should be dismissed as premature because MM Holdings has failed to first protest the matter to BLM.

In the motion to remand, BLM argues that if the Board considers the notice of appeal to be a protest of the 1968 supplemental plat which should have been adjudicated by BLM rather than being sent to the Board, it requests the Board to remand the matter to BLM for initial consideration.

Finally, in the motion to remand, BLM requests that if the Board considers the appeal to be properly filed, it be granted an extension of 30 days to file its answer.

In response, MM Holdings claims that the BLM decision was ambiguous as to the proper course of action to challenge the accuracy of the 1968 supplemental plat. It asserts that if the filing of the appeal was improper or premature and it is determined that a formal protest procedure is required, it requests that the notice of appeal in this case be treated as a timely protest of the 1968 supplemental plat. 2/

We agree with MM Holdings that the language of BLM's decision was ambiguous as to the proper procedure to be followed to challenge the BLM decision. It is clear that MM Holdings is attacking the accuracy of the 1968 supplemental plat, which served as the basis for BLM's decision. It is that plat which BLM stated could be disputed by the filing of a "formal protest" with the State Director.

[1] The regulation at 43 CFR 4.450-2 provides that "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest." We have held that only an objection to an action proposed to be taken by BLM is cognizable as a protest under that regulation. George Schultz, 94 IBLA 173, 177 (1986), and cases cited therein. In this case, the action which is being questioned by MM Holdings is not "action proposed to be taken." Rather, it is the filing of the supplemental plat, which took place in 1968.

In Peter Paul Groth, 99 IBLA 104 (1987), we addressed the question of the effect of a "protest" filed in 1984 to a 1966 resurvey, which BLM, through the Office of the Solicitor, sought to dismiss as untimely. Therein, we held that the appellant's objections to BLM's resurvey were not properly characterized as a 43 CFR 4.450-2 protest. We explained at 109:

> Absent notification of the proposed action, a strict interpretation of 43 CFR 4.450-2 to preclude an affected landowner from objecting to a resurvey seems patently unfair. Moreover, in

> survey cases this Board has not followed a practice that an objection filed with BLM after the filing of a plat of resurvey constitutes an untimely protest which must automatically result in dismissal thereof. To the contrary, in numerous cases BLM has adjudicated such objections and the Board has entertained appeals from those decisions. State of Oregon, [78 IBLA 13 (1983)]; Mr. and Mrs. John Koopman, 70 IBLA 75 (1983); George C. Matthews, 19 IBLA 215 (1975).
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> Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to this Board. [Footnotes omitted].

In Groth, the protestant was an affected landowner whose chain of title predated the filing of the plat, and there was no evidence in the record that his predecessor in interest had been notified prior to the official filing of the plat of resurvey in 1966. In the present case, MM Holdings is not an affected landowner. Its claim to the land arises as a result of the 1990 location of the Liberty No. 56 mining claim. However, we need not decide whether MM Holdings may properly object to the 1968 supplemental plat. That is an issue for initial resolution by BLM. 3/

[2] The question before the Board is whether BLM properly declared the Liberty No. 56 claim void ab initio. The answer to that question is yes. The wedge-shaped parcel of land, identified on the 1989 private survey submitted on appeal by MM Holdings and which MM Holdings asserts is designated as Lot 19 on the 1930 supplemental plat, was eliminated in the 1968 supplemental plat. That plat superseded all previous plats and formed the basis for the Master Title Plat representation that the land in question was patented land. Thus, at the time the mining claim in question was located in 1990, BLM's official records showed that the land upon which the claim was located was patented without a reservation of minerals to the United States.

It is well established that Federal mining claims may only be located on lands open to the operation of the United States mining laws. Land

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2/ Phelps Dodge has filed a motion to intervene and for leave to file an answer and memorandum in support of a motion to dismiss the appeal. The motion to intervene is granted and we have considered its answer, in which it argues, inter alia, that MM Holdings has no standing to protest the 1968 supplemental plat in this proceeding.

3/ We note that Phelps Dodge argues in its answer that "a private party who does not own an interest in the land that a resurvey affects does not have standing to challenge the official adoption of the resurvey." Answer at 3.

which has been patented without a reservation of minerals to the United States is not available for location of mining claims. Santa Fe Resources, Inc., 106 IBLA 374, 375 (1989); Ariel C. MacDonald, 52 IBLA 384 (1981);
Jonathan Carr, 49 IBLA 17 (1980). Mining claims located on such land are null and void ab initio. Merrill G. Memmott, 100 IBLA 44 (1987); John A. Ross & Maxine Lidke, 73 IBLA 16 (1983). Under the "notation" or "tract book" rule, the representation on BLM's official records that the land in question was patented land had the effect of segregating that land from locations under the mining law. See B.J. Toohey, 88 IBLA 66, 77-82, 92 I.D. 317, 324-26 (1985), and cases cited therein. If at some future date BLM determines that the 1968 supplemental plat is in error and that a wedge-shaped parcel of public land does exist, such land may be open to location under the mining law, but only after a new plat is approved.

Accordingly, BLM's official records serve as a bar to the location of the claim in question since they do not show that any land exists that is subject to location. The Liberty No. 56 is located on land shown on BLM's records to be patented without a reservation of minerals to the United States.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 4/

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

4/ Given our disposition of this appeal, it is not necessary to rule on the motions filed by BLM and Phelps Dodge nor on BLM's request for extension of time.